

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re ACCREDO HEALTH, INC.
SECURITIES LITIGATION

This Document Relates To:

ALL ACTIONS.

) Civil Action No. 03-2216-BBD

) CLASS ACTION

) LEAD PLAINTIFFS' MOTION *IN LIMINE*
) #15 TO PERMIT LEAD PLAINTIFFS TO
) EXAMINE WITNESSES IDENTIFIED
) WITH DEFENDANTS BY LEADING
) QUESTIONS AND TO PRECLUDE
) DEFENDANTS FROM EXAMINING
) WITNESSES IDENTIFIED WITH THEM BY
) LEADING QUESTIONS DURING LEAD
) PLAINTIFFS' CASE-IN-CHIEF

Lead Plaintiffs, Louisiana School Employees' Retirement System and Debra Swiman (together, "Lead Plaintiffs") and the Class of investors who purchased Accredo stock between June 16, 2002 and April 7, 2003, respectfully ask the Court to permit Lead Plaintiffs to examine witnesses identified with Defendants by leading questions, pursuant to Fed. R. Evid. 611(c), and likewise to preclude Defendants from examining those same witnesses by leading questions during Lead Plaintiffs' case-in-chief.

Lead Plaintiffs intend to call in their case-in-chief several witnesses who are either current or former employees or agents of Accredo. Lead Plaintiffs should be permitted to examine these witnesses with leading questions, pursuant to Federal Rule of Evidence 611(c). Along the same lines, Defendants should be precluded from asking leading questions of their own witnesses whom Lead Plaintiffs call during their case-in-chief.

Federal Rule of Evidence 611(c) provides that, "[w]hen a party calls a hostile witness, an adverse party, or *a witness identified with an adverse party*, interrogation may be by leading questions."¹ The phrase "witness identified with an adverse party is intended to apply broadly to an identification *based upon employment* by the party *or by virtue of a demonstrated connection* to an opposing party." *United States v. McLaughlin*, No. 95-CR-113, 1998 U.S. Dist. LEXIS 18588, at *3 (E.D. Pa. Nov. 19, 1998).

Many of the witnesses Lead Plaintiffs may call are current or former employees of Accredo, who served in a variety of positions and in some cases reported directly to the individual defendants. Additionally, some of Lead Plaintiffs' intended witnesses served as the Ernst & Young auditors hired by Accredo before and during the Class Period. Because these witnesses are "identified with" adverse parties, Rule 611(c) permits plaintiffs to use leading questions to examine them. *See*

¹ All emphasis added and all internal quotations and citations omitted, unless otherwise noted.

Chonich v. Wayne County Cmty. College, 874 F.2d 359, 368 (6th Cir. 1989) (affirming district court, which allowed the defendant college's current and former employees to be examined with leading questions "as witnesses identified with an adverse party under F.R.E. 611(c)"); *Vanemmerik v. Ground Round*, No. 97-5923, 1998 U.S. LEXIS 11765, at *6 (E.D. Pa. July 16, 1998) ("[T]he identified with clause of Federal Rule of Evidence 611(c) has been generally interpreted to mean agents, friends, relatives or employees.").

All of the current and/or former employee witnesses, identified as witnesses by Lead Plaintiffs, have been represented by Defendants' counsel, Alston & Bird, at Defendants' (or their insurer's) expense, during their depositions and each of these former employee witnesses spent significant time with Defendants' counsel in preparation for their depositions. This is further evidence indicating their association with Defendants. *See McLaughlin*, 1998 U.S. Dist. LEXIS 18588, at *3 ("witness identified with an adverse party" is, in part, based upon a "demonstrated connection to an opposing party").

Because these witnesses are current or former employees of Defendants or Defendants' auditors, and because many have been represented in this matter by Defendants' legal counsel, they are undoubtedly "identified with" Defendants. Therefore, Lead Plaintiffs should be permitted to conduct their direct examination of such adverse witnesses with leading questions.

Additionally, and for the same reasons, Defendants should be precluded from examining witnesses "identified with" Defendants using leading questions. *See Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) (noting that Rule 611(c) "ordinarily" permits examination with leading questions of an "adverse party" and a "witness identified with an adverse party," and quoting the Advisory Committee Notes to Rule 611(c) for the proposition that "[t]he purpose of the qualification 'ordinarily' is to *furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact . . .*") Because these witnesses are

current or former employees of Defendants or Defendants' auditors, and because many have been represented in this matter by Defendants' legal counsel, they are undoubtedly "identified with" Defendants. Thus, Defendants should be precluded from examining current and/or former Accredo employees and Ernst & Young witnesses with leading questions.

DATED: September 8, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 8, 2008.

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